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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DARNELL WILLIAM DEFROE,

Defendant and Appellant.

D056479

(Super. Ct. No. FVA701572)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Jon D. Ferguson, Judge. Reversed and remanded.

A jury convicted Darnell William Defroe of transporting cocaine base and
possessing cocaine base for sale. (Health & Saf. Code,¹ §§ 11352, subd. (a), 11351.5.)

Defroe appeals his convictions, contending the trial court violated his
constitutional rights and prejudicially erred by: (1) admitting testimony and documents

¹ All further statutory references are to the Health and Safety Code unless otherwise specified.

reporting that the substance he was alleged to have transported and possessed was cocaine base, without according him an opportunity to cross-examine the analyst who tested the substance; (2) denying his motion to suppress evidence obtained after police detained him without a warrant; (3) failing to dismiss the charges after material evidence was destroyed or lost, or alternatively, by not instructing the jury that it should consider the loss of the evidence in determining his guilt or innocence; and (4) denying his motion for a new trial on the ground that *Brady*² material was not timely disclosed.

We agree with Defroe's first contention, that the admission of the forensic cocaine analysis evidence violated his constitutional right of confrontation, and reverse on that ground.

FACTUAL AND PROCEDURAL HISTORY

Based on information obtained from a confidential informant, two narcotics police officers, Chris Tusan and Frank Tolerico, were watching for a red compact car at an intersection in Fontana, California. A red car arrived and parked in a McDonald's parking lot at that intersection. Defroe was in the front passenger seat, Gregory Fisher was in the back seat, and Defroe's girlfriend was driving. Defroe opened the car door and stepped out of the car. From 20 to 30 feet away, Tusan saw the hand grip and the rear part of a semiautomatic handgun between the front passenger's seat and the door of the car. Tusan pointed his gun at Defroe, identified himself as a Fontana police officer and

² *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

told Defroe not to move. Defroe sat back into his seat, and obeyed Tusan's order to put his hands up. Tusan took Defroe out of the car and handcuffed him. Tusan then walked Defroe to the back of the car. As he was doing so, Tusan saw a baggie, tied in a knot and containing a round white substance he believed to be cocaine, hit the ground near Defroe's pant leg. Tusan saw Defroe kick the baggie under the car.

After retrieving the baggie and the handgun, Tusan arrested Defroe. Defroe told him, "The homie in the back seat gave me the gun because two white guys were walking up on us, and then you contacted us." Defroe continued, "I'm glad we didn't bring what we were going to bring." Searching Defroe, Tusan found \$1,850 in his pocket, in bills of various denominations, including hundreds, a fifty, twenties, tens and fives. Based on the presence of the gun and the amounts of cocaine-like substance and cash, Tusan believed Defroe possessed cocaine for sale. Tusan submitted the baggie to the crime lab for analysis of the white substance and turned the currency over for forfeiture proceedings. He did not request fingerprinting analysis of either the baggie or money.

In addition to the cocaine charges (counts 2 & 3), the information charged Defroe with possession of a controlled substance with firearm (§ 11370.1, subd. (a), count 1).

The jury found Defroe guilty of transportation of a controlled substance (count 2) and possession for sale of a controlled substance (count 3), but deadlocked, 10 to 2, in favor of conviction on possession of a controlled substance with firearm (count 1). The court declared a mistrial as to count 1.

At sentencing, the court granted Defroe supervised felony probation for a period of three years and imposed a 365-day term to be served in county jail, along with certain fees and reimbursements to be paid after release from custody. The court dismissed count 1, possession of a controlled substance with firearm, on the prosecution's motion.

DISCUSSION

I

CONFRONTATION CLAUSE

Defroe contends he was deprived of his Sixth Amendment right to confrontation by the admission of testimony and written laboratory reports showing that the substance contained in the baggie found under the car tested as cocaine base, without according him the opportunity to cross-examine the analyst who performed the tests. Before analyzing the merits of this claim, we first review the relevant proceedings and law.

A. Proceedings Relevant to This Claim

At trial, Donald Jones, supervising criminalist with the San Bernardino County Sheriff's Department crime laboratory, testified that the substance in the baggie found under the car was 25.53 grams of cocaine base. Jones based his testimony on two laboratory reports and other records documenting testing performed by John Jermain, a laboratory analyst. Jones did not purport to render an opinion on the composition of the substance in the baggie based on his own knowledge and experience. Rather, his testimony relied solely on the crime lab's records and the reports of Jermain's testing (the

laboratory reports). Jermain did not testify at any point in the proceedings. The prosecution sought to admit the reports themselves as business records.

Defroe objected to admission of the laboratory reports and Jones's testimony reporting the testing results, arguing that the results were testimonial because they were prepared for the purpose of trial and the prosecution was therefore required to produce the analyst who performed the testing. There was no showing Jermain was unavailable. The court overruled the objection based on the California Supreme Court's decision in *People v. Geier* (2007) 41 Cal. 4th 555 (*Geier*), and admitted the laboratory reports as business records.

The laboratory reports were completed forms entitled "Request for Analysis," showing the defendant and the offense for which the substance was submitted to the crime laboratory, as well as the typewritten report of the laboratory results.³ Both reports were signed by Jermain under the statement, "I hereby certify the foregoing laboratory analysis to be true under penalty of perjury." On each form, a preprinted blank in the analysis section for "date and time logged" was left blank.

Supervising criminalist Jones testified that at or near the time of the testing, crime lab analysts initially write the results of their testing in handwritten notes and then write a report at the bottom of their notes. The notes are reviewed by a second analyst who

³ The first laboratory report, dated October 8, 2007, reported "[t]he off-white rock substance (net weight 25.54 gram[s]) contains cocaine consistent with the base." The second laboratory report, dated November 14, 2007, stated "Additional Analysis: The off-white rock substance (net weight 25.53 grams) contains cocaine base."

determines if the wording of the report is in accordance with the test results (a "technical review"). After the technical review, the case is forwarded to clerical staff for typing and is returned to the analyst, who makes sure it is typed correctly and signs it.

Based on Jermain's notes, Jones testified that the tests Jermain ran on the substance were reliable tests the crime lab typically uses in controlled substance analysis, including a color test, two micro-crystal tests and a thin-layer chromatography test. The crime lab file also contained the prosecuting attorney's request for additional testing to determine the form of cocaine. Jones testified that in response to that request, Jermain performed a Fourier Transform Infrared Spectrophotometry.

On cross-examination, Jones acknowledged he had no firsthand knowledge of the substance or the tests, but that he testified as a "custodian of the records" with the background necessary to interpret the results. Jones acknowledged he would not be able to answer questions about the testing other than as they pertained to standard practices and procedures and information appearing in the crime lab file.

B. *Applicable Law*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (U.S. Const., 6th Amend.) This right renders testimonial statements by a nontestifying witness inadmissible unless the witness is unavailable and was previously subject to cross-examination by the defendant. (*Crawford v. Washington* (2004) 541 U.S. 36, 59 & fn. 9 (*Crawford*).) In the *Geier* decision, relied upon by the trial court in this case, the

California Supreme Court applied *Crawford* and concluded that a laboratory report and notes containing results of DNA testing were not testimonial because they reflected contemporaneously-recorded results of facially-neutral scientific testing. Accordingly, the results could be conveyed through testimony by a laboratory supervisor without violating the confrontation clause. (*Geier, supra*, 41 Cal.4th at pp. 602-604, citing *Davis v. Washington* (2006) 547 U.S. 813, 817 (*Davis*).)

In its latest decision under *Crawford*, rendered after trial in this case, the United States Supreme Court held that certificates of forensic drug analysis were testimonial under the confrontation clause because they were formally sworn, supplied proof of a fact, and were ""made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."" (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ____ [129 S.Ct. 2527, 2532; 174 L.Ed.2d 314, 321] (*Melendez-Diaz*), quoting *Crawford, supra*, 541 U.S. at p. 52.)⁴ *Melendez-Diaz* undercut the rationales underlying the *Geier* decision and casts doubt upon the trial court's reliance on the business records exception to admit the laboratory

4 After *Melendez-Diaz*, a split of authority developed among California appellate courts regarding whether *Geier* remains good law or was overruled in *Melendez-Diaz*. The split of authority is addressed by the parties in their briefs but we do not cite to or rely on those opinions that have been superseded by a grant of review. (Cal. Rules of Court, rule 8.1115; see *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620; *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046.)

reports at issue, holding that statements in official records produced for use at trial or records of a business whose "regularly conducted business activity is the production of evidence for use at trial" may only be admitted subject to the demands of the confrontation clause. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2538.)⁵ As we explain below, we evaluate Defroe's challenge to the admission of the reports and Jones's testimony under both *Melendez-Diaz* and *Geier*.

C. *The Trial Court Constitutionally Erred in Admitting the Laboratory Reports as Business Records*

To determine whether the laboratory reports are testimonial, we focus our inquiry on whether the reports were prepared for the purpose of proving a fact "under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial." (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2532.)

The laboratory reports demonstrate on their face that they were prepared for Defroe's criminal prosecution. The reports were used at trial to provide proof of a fact essential to the prosecution, namely, that the substance found in the baggie under the car was cocaine base. They were sworn under penalty of perjury. Like the certificates at issue in *Melendez-Diaz*, the laboratory reports represent "a solemn declaration or

⁵ *Geier* had favorably reviewed decisions from other states holding that forensic test results are admissible as business records, and concluded that because the test results at issue in that case were contemporaneous recordings of present rather than historical facts, they would be so admissible. (*Geier*, *supra*, 41 Cal.4th at p. 606 & fn. 12.)

affirmation made for the purpose of establishing or proving some fact,""" and were ""made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial."" (*Melendez-Diaz, supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2532; see also *People v. Benitez* (2010) 182 Cal.App.4th 194, 200 [drug analyst's notes and laboratory report are testimonial where they were prepared to be used by the prosecution to establish defendant's possession of methamphetamine].)

Attempting to show the reports are not testimonial, the Attorney General contends that analysts "do not create their reports for use in criminal proceedings [but] in order to assist the investigating agency who requested the test results." However, this is a distinction without a difference. As Jones testified, the crime lab is part of the sheriff's department and therefore is itself part of law enforcement, and the reports themselves indicate the reports are requested for the purpose of a criminal proceeding against a particular defendant on a particular charge. The second laboratory report in this case was specifically requested by the prosecuting attorney to show that the substance was in the form of "cocaine base."

The Attorney General also contends the laboratory reports are not testimonial because they were "generated contemporaneously with the analysis of the substance." The evidence, however, does not support this contention. Although the testimony at trial showed that results of lab tests generally were recorded as handwritten notes at or near the time they were observed, Jermain's handwritten notes regarding the laboratory results

were not introduced at trial and there was no testimony concerning what results were contained in Jermain's notes. The laboratory reports admitted into evidence were *not* "contemporaneously-recorded" or "near-contemporaneously-recorded" results. Rather, they were created by the crime laboratory typists at an unspecified time.⁶

Moreover, even were we to accept the Attorney General's characterization of the laboratory reports as "contemporaneous records," under *Melendez-Diaz* the contemporaneous recording of a laboratory result does not eliminate its testimonial nature. Whereas *Geier* construed *Crawford* and *Davis* as holding that a statement was not testimonial if it represented the contemporaneous recordation of observable events (see *Geier, supra*, 41 Cal.4th at pp. 606-607), *Melendez-Diaz* minimized the weight to be given to contemporaneity in confrontation clause analysis. (*Melendez-Diaz, supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2532.)

We conclude the laboratory reports are testimonial and therefore subject to the requirements of the confrontation clause. We next consider the Attorney General's argument that the testimony of supervising criminalist Jones satisfied Defroe's right of confrontation.

⁶ The laboratory reports are blank where there is a space for "date and time logged" and there is no evidence in the record indicating how long an interval occurred between the testing and signing of the reports.

D. *Jones's Testimony Did Not Satisfy the Right of Confrontation*

The confrontation clause guarantees a defendant the right "to be confronted with *the* witnesses against him." (U.S. Const., 6th Amend., italics added.) Accordingly, testimonial evidence — whether it be notes, a report or a sworn statement — may not be introduced into evidence through the in-court testimony of someone other than the witness without violating the confrontation clause. (*Davis, supra*, 547 U.S. at p. 826 ["we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant"]; see also *Melendez-Diaz, supra*, 557 U.S. at p. ___, 129 S. Ct. at p. 2546 (dis. opn. of Kennedy, J.) ["The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second"].) As explained in *Melendez-Diaz*, the opportunity for cross-examination is essential to the protection guaranteed by the confrontation clause, because "'the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.'" (*Melendez-Diaz, supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2536, quoting *Crawford, supra*, 541 U.S. at p. 61.) The confrontation clause thus guarantees an opportunity to test the "honesty, proficiency, and methodology" of the actual author of a laboratory report introduced into evidence to prove a fact essential to the prosecution. (*Melendez-Diaz, supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2538.)

Here, the prosecution failed to present the author of the report or any other witness with firsthand knowledge about the forensic test results showing the substance dropped by Defroe was cocaine base. Jones did not express an expert opinion that the substance tested was cocaine base, but merely conveyed the results Jermain had obtained "as the custodian of the records." Jones acknowledged he could not respond knowledgeably to questions about whether Jermain correctly performed the tests, or had tested the wrong substance or commingled substances. Jones therefore could not effectively be cross-examined about the results of the testing and his testimony did not satisfy Defroe's Sixth Amendment right to confrontation under *Melendez-Diaz*. (*Id.*)

As the Attorney General aptly points out, *Melendez-Diaz* did not involve a supervisor from the crime laboratory testifying about the procedures that produced the drug analysis certificates in that case, whereas such a supervisor did testify in *Geier*. However, in *Geier*, the supervisor who testified to DNA results produced by another analyst had in fact cosigned those results and thus had knowledge of the analysis and the veracity of the report. (*Id.* at pp. 621-622.) Further, the supervisor testified that it was her own opinion, based on the results, that the DNA was an unlikely match. (*Id.* at p. 622.)⁷ Therefore, the defendant was able to cross-examine the supervisor regarding

⁷ In *People v. Bowman* __ Cal.App.4th __ [2010 Cal.App.Lexis 381], our colleagues in the Fifth District held that *Geier* permitted the admission of testimony from a laboratory supervisor who reviewed the drug testing notes and report, despite the fact that the performing analyst did not testify, because her testimony constituted an expert opinion. Unlike *Bowman*, here Jones did not testify as an expert but rather as a custodian of records.

her personal knowledge of the test results and her opinion. (*Id.* at p. 596.) Here, on the other hand, as we have explained, Defroe had no opportunity to cross-examine a witness regarding the veracity of the reports. Jones's lack of direct knowledge thus distinguishes this case from *Geier*.⁸

The prosecution did not show that Jermain was unavailable to testify and that Defroe had a previous opportunity to cross-examine him. Therefore, having determined that the laboratory reports were inadmissible without satisfying the demands of the confrontation clause and that the opportunity to cross-examine Jones did not satisfy the right to confront the author of the reports, we conclude that the trial court's admission of the laboratory reports and Jones's testimony quoting the reports violated Defroe's right of confrontation. (*Melendez-Diaz, supra*, 557 U.S. at p. ___, 129 S.Ct. at p. 2538.)

E. *The Trial Court's Error in Admitting the Laboratory Reports and Jones's Testimony Was Not Harmless*

In determining whether a confrontation clause violation is prejudicial, we employ the harmless error standard announced in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Cage* (2007) 40 Cal.4th 965, 991-992.) Under the *Chapman* standard, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 (*Van Arsdall*).) In making

⁸ Moreover, *Geier* held the DNA reports were admissible because they were nontestimonial in nature, not because the confrontation clause permits a substitute witness to testify to reports that are testimonial. (*Geier, supra*, 41 Cal.4th at p. 607.)

this inquiry, we consider "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Id.* at p. 684.)

To prove Defroe committed the offenses of which he stands convicted, the prosecution was required to show that Defroe (1) possessed for sale and (2) transported⁹ a controlled substance. (§§ 11352, subd. (a), 11351.5.) Here, the prosecution relied *solely* on the laboratory reports and Jones's testimony quoting them to establish that the substance in the baggie that Tusan said Defroe kicked under the car was cocaine base, a controlled substance. (§ 11054, subd. (f)(1).)¹⁰ The laboratory reports and Jones's

⁹ "Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character." (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.) "Such knowledge may be shown by circumstantial evidence . . .," and may be inferred from joint or exclusive possession of the drug in a moving vehicle. (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 475; *People v. Rogers* (1971) 5 Cal.3d 129, 133-134.)

¹⁰ At oral argument the Attorney General argued that admission of the reports and Jones's testimony, if error, was harmless because (1) Defroe did not contest that the substance at issue was cocaine, and (2) Tusan field tested the substance as cocaine. The Attorney General's arguments lack factual support. Defroe did challenge, by motion to dismiss at the start of trial, the prosecution's ability to prove the substance was cocaine, given that the substance had been destroyed and that the witness it expected to convey the lab results, Jones, had never seen the substance. Tusan's field test results were never introduced or admitted at trial. Therefore, the only evidence showing the substance in the baggie was cocaine consisted of the erroneously-admitted laboratory reports and Jones's testimony.

testimony quoting them thus played a critical role in the outcome of the case.

Accordingly, we conclude the error in admitting the reports and testimony was not harmless beyond a reasonable doubt. (*Van Arsdall, supra*, 475 U.S. at p. 681.)

Accordingly, we reverse Defroe's convictions for possession and transportation of cocaine base without prejudice.¹¹

II

FOURTH AMENDMENT SEARCH AND SEIZURE

Defroe next challenges the trial court's denial of his motion to suppress evidence pursuant to Penal Code section 1538.5, arguing his warrantless detention, arrest and subsequent search violated the Fourth and Fourteenth Amendments. We analyze each of these claims in turn, after reviewing the relevant proceedings and applicable standard of review.

¹¹ Defroe contends there is insufficient evidence apart from the erroneously-admitted laboratory reports to sustain his convictions. However, an appellate court reviewing whether sufficient evidence supports a conviction considers the erroneously-admitted evidence together with other evidence. (*Lockhart v. Nelson* (1988) 488 U.S. 33, 40-41; *People v. Cooper* (2007) 149 Cal.App.4th 500, 522.) Viewing all of the evidence in the light most favorable to the prosecution, we must uphold the conviction if "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Applying this standard, we conclude the record contains evidence sufficient to support Defroe's convictions for possession of cocaine base for sale and transportation of cocaine base.

A. *Proceedings Relevant to This Claim*

Before the preliminary hearing, Defroe moved to compel the prosecution to disclose the identity of the confidential informant who gave Tusan information regarding the potential drug exchange on the day Defroe was arrested. The trial court denied the motion after an in camera hearing. Defroe then moved to suppress any evidence under the so-called *Harvey-Madden*¹² rule, arguing that because the prosecution had failed to produce the source and information relied upon by Tusan to make what Defroe argued was a "traffic stop," all evidence seized pursuant to the stop should be excluded.

At the hearing on the motion to suppress, Tusan testified that on the day of Defroe's arrest, he received information from a confidential informant that the informant had set up an exchange of firearms for two ounces of drugs at the intersection of Sierra and Valley in Fontana, involving a red compact car. Tusan then saw the red car, in which Defroe was riding, park in the McDonald's parking lot, and he saw the gun in the well next to Defroe's seat as Defroe opened the door and got out of the car. After he handcuffed Defroe, Tusan testified he saw Defroe kick the baggie, containing what appeared to be cocaine, under the car.

¹² *People v. Harvey* (1958) 156 Cal.App.2d 516 (*Harvey*) and *People v. Madden* (1970) 2 Cal.3d 1017 (*Madden*). The *Harvey-Madden* rule requires disclosure of information an officer receives through official channels where it is relied upon by law enforcement to establish grounds for an arrest or detention and search. (*In re Richard G.* (2009) 173 Cal.App.4th 1252, 1258-1259, citing *Harvey, supra*, 156 Cal.App.2d 516, and *Madden, supra*, 2 Cal.3d 1017, 1021.)

The trial court denied the motion to suppress, rejecting Defroe's argument that there was a traffic stop. Relying on Tusan's testimony that his initial contact with Defroe took place in a parking lot, the court concluded Tusan was in a public place when he observed the gun about two-thirds visible in the car and that Tusan thereafter reasonably detained and handcuffed Defroe and seized the gun. The court credited Tusan's account of seeing Defroe kick the baggie under the car. The trial court then concluded that a lawful search incident to arrest had resulted in Tusan's finding the currency in Defroe's pocket.

B. *Standard of Review*

"In reviewing the trial court's ruling on the suppression motion, we uphold any factual finding, express or implied, that is supported by substantial evidence, but we independently assess, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness." (*People v. Hughes* (2002) 27 Cal.4th 287, 327.)

C. *Tusan's Investigatory Detention of Defroe Was Based on Reasonable Suspicion Not Requiring Disclosure of Information from the Confidential Informant*

Defroe contends the government failed to show his detention was justified, arguing that the police had engineered the "stop" of the car in which he was riding, and the prosecution was therefore required to produce the information received from the confidential informant who set up the drug exchange under the so-called *Harvey-Madden* rule. We disagree. Substantial evidence supports the trial court's findings that there was

no "stop" of the car and that Tusan's observation, in a public place, of the gun next to Defroe's seat supplied reasonable suspicion to detain Defroe. We therefore disagree that the prosecution was required to produce the information police received from the confidential informant to justify Defroe's detention.

A detention or "stop" occurs when an officer, by force or show of authority, restrains a person's liberty to walk away. (*Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16; *People v. Souza* (1994) 9 Cal.4th 224, 229 (*Souza*).) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Souza*, at p. 231.) This standard of "[r]easonable suspicion is a lesser standard than probable cause, and can arise from less reliable information than required for probable cause" (*People v. Wells* (2006) 38 Cal.4th 1078, 1083.)

Contrary to Defroe's contention, the trial court found that the car had parked *before* Defroe was detained. Tusan testified that after the car pulled into the parking spot and Defroe got out of the car, there was a gun in plain view next to Defroe's seat. Tusan then told Defroe to freeze and handcuffed him. Substantial evidence thus supports the trial court's findings that Tusan detained Defroe after observing the gun in a public place.

Tusan's observation of the partially-concealed gun was an articulable fact that provided reasonable suspicion that Defroe may have been involved in the crime of

carrying a concealed weapon. (Pen. Code, § 12025, subd. (a).)¹³ Accordingly, Defroe's detention was based on a reasonable suspicion that he was involved in criminal activity. (*Souza, supra*, 9 Cal.4th at p. 230.)¹⁴ We therefore conclude the trial court properly denied the motion to suppress with respect to the baggie and cocaine, rejecting Defroe's contention that the prosecution was required to produce the information from the confidential informant to justify his detention. (Cf. *In re Richard G., supra*, 173 Cal.App.4th at p. 1259 [where independent evidence creates reasonable suspicion, "it is not necessary to require strict compliance with the '*Harvey-Madden*' rule"].)¹⁵

¹³ Carrying a concealed weapon, without a permit, within a car in which one is an occupant is a crime. (Pen. Code, § 12025, subd. (a)(3).) A gun that is partially concealed in a car is considered concealed. (*People v. Hale* (1974) 43 Cal.App.3d 353, 356 [partial concealment of a weapon constitutes concealment]; *People v. May* (1973) 33 Cal.App.3d 888, 890-892 [finding a small gun carried in a pocket was concealed even though a police officer could identify the gun without searching the defendant]; *People v. Koehn* (1972) 25 Cal.App.3d 799, 802-803, 806 [upholding an arrest for carrying a concealed weapon in a vehicle when the handle of a gun was protruding from the floorboard].)

¹⁴ We reject Defroe's contention that Tusan's observation of the gun in the car arose from an unconstitutional search. "[O]bservations of things in plain sight made from a place where a police officer has a right to be do not amount to a search in the constitutional sense." (*Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 634; *Horton v. California* (1990) 496 U.S. 128, 133-134 [observation and seizure of article in plain view does not involve invasion of privacy].)

¹⁵ Likewise, because Defroe was reasonably detained on suspicion of carrying and possession of a concealed weapon, we reject Defroe's contention that the initial patdown search of Defroe during his detention was unlawful. (Cf. *People v. Sandoval* (2008) 163 Cal.App.4th 205, 212 [patdown search unlawful where officer testified he did not suspect defendant was engaged in criminal activity and had no reason to believe defendant was armed].) In any event, the initial patdown search did not produce any weapons or other evidence.

Having concluded that Defroe's detention was constitutional based on Tusan's reasonable suspicion of Defroe's involvement in criminal activity, we now turn to Defroe's contention that Tusan lacked probable cause for his arrest and the subsequent search resulting in Tusan's locating the currency in Defroe's pocket.

D. *Defroe's Arrest Was Based on Probable Cause and the Currency was Found in a Reasonable Search Incident to Lawful Arrest*

Defroe also contends that his arrest and the searches of his person and the car were unsupported by probable cause and therefore unconstitutional. We disagree. The search that produced the currency from Defroe's pocket was a search incident to lawful arrest based on Tusan's observation of Defroe's kicking of the baggie, which appeared to hold cocaine, under the car.

Probable cause for an arrest — and a search incident to arrest — exists when the facts "would lead a reasonable officer of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that a crime had been or was being committed. [Citation.] When an officer has probable cause to arrest a person for narcotics possession, the warrantless search becomes justified as a search incident to arrest." (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1075 (*Avila*); *Chimel v. California* (1969) 395 U.S. 752, 762-763 ["it is reasonable for the arresting officer to search the person arrested in order to remove any weapons [and] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction"].)

The trial court found Tusan arrested Defroe after retrieving the baggie that appeared to hold cocaine and had been kicked by Defroe's foot under the car. We accept those findings as substantially supported by Tusan's testimony. (*People v. Munoz* (2008) 167 Cal.App.4th 126, 132.)

Independently reviewing whether those facts support probable cause to arrest, we agree that a reasonable officer would consider Defroe's kicking of a baggie containing an off-white substance appearing to be cocaine under the car to be probable cause to arrest Defroe for possession of the cocaine. (E.g., *People v. Wesley* (1990) 224 Cal.App.3d 1130, 1146 [probable cause for charge of possession of cocaine existed where defendant threw away a baggie appearing to contain cocaine after realizing he was about to be arrested].) We conclude probable cause existed to arrest Defroe for narcotics possession and a concealed weapon violation, and therefore conclude the search during which Tusan found the currency in Defroe's pocket was lawful as a search incident to arrest. (*Avila, supra*, 58 Cal.App.4th at p. 1075.) We therefore conclude the trial court properly denied Defroe's motion to suppress.¹⁶

¹⁶ We need not, and do not, reach Defroe's contention that the police search of the car was unconstitutional. Defroe points to no evidence found in the car search; in fact, the testimony of Defroe's sole witness established there was nothing found in the car search.

III

DESTRUCTION OF EVIDENCE

Defroe contends that his conviction should be reversed because he was denied due process when the prosecution failed to preserve evidence against him, namely, (1) the currency seized from his pocket, which was commingled and thus lost when it was deposited into a bank account, and (2) the cocaine and baggie, which was destroyed after its testing by the sheriff's department crime lab before trial.

We discuss each of Defroe's contentions after reviewing the applicable law.

A. *Applicable Law*

The People have a duty to preserve material evidence, defined as evidence ""that might be expected to play a significant role in the suspect's defense,"" meaning (1) the ""evidence must both possess an exculpatory value that was apparent before the evidence was destroyed,"" and (2) the evidence is ""of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."" (*People v. Zapien* (1993) 4 Cal.4th 929, 964, quoting *California v. Trombetta* (1984) 467 U.S. 479, 488-489 (*Trombetta*).) If a defendant proves the loss of material evidence, the court has "discretion to impose appropriate sanctions, including fashioning a suitable cautionary instruction." (*People v. Medina* (1990) 51 Cal.3d 870, 894 (*Medina*).)

The state's obligation to preserve evidence is more limited when the evidence is only potentially exculpatory, i.e., it "could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood* (1988) 488 U.S.

51, 57 (*Youngblood*).) In such cases, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Id.* at p. 58.) The requirement to show bad faith applies even where the evidence is central to the case and has been requested in discovery.

(*Illinois v. Fisher* (2004) 540 U.S. 544, 547-549.)¹⁷

On review of a trial court's ruling on a *Trombetta/Youngblood* motion, "we must determine whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling." (*People v. Roybal* (1998) 19 Cal.4th 481, 510.)

B. *Commingling of the Currency Did Not Violate Defroe's Due Process Rights*

1. Proceedings Relevant to This Claim

After being booked into evidence, the currency found in Defroe's pocket was deposited in a bank account and commingled with other money, prior to the preliminary hearing. Shortly thereafter, Defroe moved under *Trombetta* to dismiss the charges and to exclude the evidence on the ground that the commingling of the currency denied him due

¹⁷ We reject the varying standards Defroe urges us to apply for preservation of evidence, as those have been superseded by the California Supreme Court's adoption of the *Trombetta* and *Youngblood* standards (*People v. Melton* (1988) 44 Cal.3d 713, 750-751, and *People v. Hitch* (1974) 12 Cal.3d 641 (*Hitch*), superseded by *People v. Johnson* (1989) 47 Cal.3d 1194, 1233-1234 [adopting *Trombetta* rule]; *People v. Cooper* (1991) 53 Cal.3d 771, 810-811 [*Trombetta* and *Youngblood* apply]), or are otherwise inapplicable here. (*People v. Valencia* (1990) 218 Cal.App.3d 808, 825 [evidence that may be subjected to testing is subject to *Youngblood* standard, not *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, which applies to claims of due process in connection with witness deportation].)

process. Testifying at the hearing on Defroe's motion, Tusan stated he did not fingerprint the money because it was found in Defroe's pocket, he had never heard of currency being fingerprinted, and that the process of fingerprinting currency would result in a large number of prints as well as destroy the currency. Tusan booked the money into evidence and it was then deposited in a bank account pursuant to department policy. The currency was subject to forfeiture proceedings, and standard forfeiture procedures call for currency to be deposited in an interest-bearing account.

The trial court denied Defroe's *Trombetta* motion on the ground that the currency did not have exculpatory value. Because it had come from Defroe's pocket, it was as likely to be inculpatory as exculpatory, and because of the nature of currency, fingerprinting would have been only of limited value.

2. Analysis

Defroe appears to contend that the currency was apparently exculpatory because it would not show his fingerprints and would be useful to impeach Tusan's testimony that it had come from his pocket. Defroe has not shown that the currency had exculpatory value apparent to the police before its loss. (*Trombetta, supra*, 467 U.S. at pp. 488-489.)

Substantial evidence supports the trial court's finding that the currency had no apparent exculpatory value. Tusan's testimony showed the currency came from Defroe's pants pocket and that it was improbable that fingerprinting the bills would rule out Defroe's possession because there would be numerous, crossing fingerprints. The evidence therefore showed no reason to believe that the currency would tend to exonerate

Defroe. We conclude the currency had no apparent exculpatory value before it was commingled. (See *Medina, supra*, 51 Cal.3d at p. 893 [no sanction for destruction of a bottle bearing a fingerprint, because the officer who destroyed the bottle "could not know at the time the prints were taken whether, or to what extent, the Perrier bottle's print matched defendant's prints"]; *U.S. v. Martinez-Martinez* (9th Cir. 2004) 369 F.3d 1076, 1087 [no bad faith failure to take blood or urine samples at time of defendant's arrest where it was not readily apparent that samples might have proven exculpatory for immigration crime].)¹⁸

Because the currency had no apparent exculpatory value, Defroe needed to show it was commingled in bad faith in order to show he was entitled to any sanction for a violation of due process. (*Illinois v. Fisher, supra*, 540 U.S. at pp. 547-549; *Medina, supra*, 51 Cal.3d at p. 894.) However, the testimony showed it was not regular practice for police to fingerprint currency and that Tusan believed there was no purpose in doing so because of the numerous, crossing fingerprints that it would show. Defroe thus failed to show that the police acted in bad faith when they deposited the money in an interest-bearing account in accordance with standard forfeiture procedures. Accordingly, the

¹⁸ Defroe's suggestion that he "repeatedly" requested the fingerprinting of the currency are not supported by the record. The record shows his counsel learned the currency had been deposited into a bank account prior to the preliminary hearing in March 2008. The record does not reflect any specific requests were made for fingerprinting of the currency. Defroe did move for discovery of all fingerprinting and other forensic testing of any evidence, as well as access to all actual physical evidence, in October 2007.

trial court did not err in denying Defroe's motion to dismiss based on commingling of the currency.

C. *The Destruction of the Cocaine and Baggie Did Not Violate Defroe's Due Process Rights*

1. Proceedings Relevant to This Claim

Before trial, Defroe requested that the baggie and cocaine be brought to court so that the jury could see it and defense counsel could use it in cross-examining Tusan. The trial court agreed that there was probative value for the jury to actually see the evidence and ordered it to be produced at trial. However, after jury selection, the prosecution informed the court the cocaine and baggie had been destroyed a month earlier pursuant to normal crime lab procedures. Defroe moved to dismiss the case, arguing that (1) the baggie's size, shape and texture showed it was physically impossible for it to have been kicked under the car or dropped down his pants as Tusan's testimony implied; and (2) the evidence was destroyed in bad faith because the prosecution had notice of its exculpatory value.

During a hearing on Defroe's motion to dismiss, the parties stipulated that the district attorney and the police knew the case was going to trial before the evidence was destroyed; that there was no request to produce the evidence at trial until after the baggie and cocaine were destroyed; and that the crime lab had not consulted the district attorney about the destruction. The trial court denied the motion, finding that the baggie and cocaine had no apparent exculpatory value at the time they were destroyed because

testing had already altered them. Noting that the destruction of evidence came to light only after the jury was selected, the trial court offered to consider a request for mistrial or a jury instruction, based on how the evidence came in at trial, "to describe essentially the status of the evidence and its inability to be brought in." Defroe declined to move for a mistrial.

At trial, little evidence about the baggie's physical characteristics was introduced, apart from the fact that it was a small, ball-shaped package tied in a knot around 25.5 grams of cocaine. There were no photographs of the baggie and cocaine in its pre- or post-testing state. Tusant and Defroe's former girlfriend both testified that it contained an off-white substance.

The defense later proffered a jury instruction stating that the jury should consider the police's failure to preserve the evidence and that if it found any law enforcement officer "destroyed or failed to preserve evidence in a deliberate design to falsely convict the defendant," it would have a duty to acquit. The court refused to give the instruction on the ground it was "argumentative and not supported by the evidence," relying on its findings that the currency and baggie with cocaine lacked apparent exculpatory value.

2. Analysis

In order to show the evidence that was destroyed was material under *Trombetta*, a defendant must show both that it possessed an exculpatory value that was apparent before the evidence was destroyed and that he or she would be "'unable to obtain comparable evidence by other reasonably available means.'" (*Trombetta, supra*, 467 U.S. at p. 489.)

Trombetta does not require that a defendant have access to evidence identical to what was lost or destroyed. (*Ibid.*; *People v. Gonzales* (1986) 179 Cal.App.3d 566, 575 [noting *Trombetta* court was willing to "settle for far less satisfactory secondary evidence" where original breath samples were not available].)

Here, Defroe's defense theory was that because of the baggie's size, shape and texture, he could not have dropped the baggie through his pants when he was handcuffed, as Tusan testified. Although the baggie was not available at trial, Defroe could have utilized other means to show its size, shape and texture, such as testimony from either or both of the witnesses who testified at trial about seeing the baggie. Defroe has not shown such testimony was not "reasonably available" or that it would not qualify as comparable evidence. (*Trombetta, supra*, 467 U.S. at p. 489.)¹⁹ Destruction of the baggie and cocaine base therefore did not deprive Defroe of due process under *Trombetta*.

(*Trombetta, supra*, 467 U.S. at p. 489; *Youngblood, supra*, 488 U.S. at p. 57.)²⁰

¹⁹ Defroe makes no claim that he was deprived of the ability to test the substance using his own expert analyst. He made no request for analysis independent of the crime lab's analysis in the trial court and did not attempt to show the substance was not proved to be cocaine, but rather based his arguments on the apparent outward physical properties of the baggie.

²⁰ Defroe argues that it is unfair to require him to show the exculpatory value of evidence that has been destroyed and is therefore unavailable for testing, stating this places him in a "Catch-22 situation." Defendant cites *People v. Brophy* (1992) 5 Cal.App.4th 932, apparently for the proposition that the government should bear the burden to show the evidence was not material. In *Brophy*, the defendant sought to suppress evidence from search of a package by a postal inspector, who refused to disclose whether the search was conducted with a warrant. The court of appeal held the trial court

Defroe also failed to show the prosecution acted in bad faith in destroying the cocaine and baggie. The evidence showed the cocaine and baggie were destroyed approximately one year after being tested, consistent with standard laboratory procedures where the district attorney or investigating officer has not asked that evidence be retained. There was no evidence showing that the district attorney or investigating officer knew that Defroe expected to use the baggie as demonstrative evidence at trial. In fact, the parties stipulated no request to produce the evidence at trial was made until after the baggie was destroyed. Tests showed the baggie contained cocaine base, and the evidence was, therefore, inculpatory.²¹ The prosecution's failure to request that the evidence be retained in these circumstances does not show bad faith as required to show a deprivation of due process. (*Youngblood*, *supra*, 488 U.S. at p. 57.)

When, as here, there is no *Trombetta/Youngblood* violation, "[t]he trial court [is] not required to impose *any* sanction, including [the giving of cautionary] jury instructions." (*People v. Cooper*, *supra*, 53 Cal.3d at p. 811; see also *People v. Huston* (1989) 210 Cal.App.3d 192, 215 [no error in failure to give cautionary instruction in

should have either enforced discovery sanctions against the postal inspector or shifted the burden to the prosecution to prove that the original package search was pursuant to a warrant. (*Brophy*, at p. 938.) However, as we have explained, this case is governed by *Trombetta*, which does not authorize shifting the burden to the prosecution to show a constitutional level of materiality. (*Trombetta*, *supra*, 467 U.S. at pp. 488-489.)

²¹ Compare *U.S. v. Cooper* (9th Cir. 1993) 983 F.2d 928, 931 [bad faith shown where government destroyed equipment it held as evidence of illegal drug making after being made aware of the defendants' claim it was used for making legitimate drugs.]

absence of *Trombetta* violation]; *People v. Gonzales* (1989) 209 Cal.App.3d 1228, 1233-1234 [rejecting similarly-worded instruction and expressing doubt that any instruction would be required where name of witness who was not material was inadvertently not provided to defense].)²²

Because Defroe fails to show the money or cocaine and baggie were material or were destroyed in bad faith, he fails to show any violation of due process. We therefore conclude the trial court properly denied Defroe's motions to dismiss and properly refused to instruct the jury as Defroe requested.

IV

BRADY VIOLATION

Defroe claims that the prosecutor violated his due process rights under *Brady, supra*, 373 U.S. 83, by failing to download and produce information contained in cell phones seized by the police at the scene. Specifically, Defroe contends that the information contained in his and Fisher's cell phones contained exculpatory information showing it was Fisher, not Defroe, who spoke with the confidential informant to set up the drug exchange.

²² Defroe relies on *People v. Zamora* (1980) 28 Cal.3d 88, which found error in the trial court's refusal to instruct the jury to consider the destruction of complaint records against the police where those records were material and favorable to the defendant under *Hitch, supra*, 12 Cal.3d 641. We disagree that *Zamora* requires us to evaluate whether an instruction was required by utilizing the *Hitch* standard for materiality, which has been superseded by the *Trombetta/Youngblood* standard. (*People v. Cooper, supra*, 53 Cal.3d at p. 811.)

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady, supra*, 373 U.S. at p. 87.) This duty to disclose such evidence applies even when there has been no request by the accused (*United States v. Agurs* (1976) 427 U.S. 97, 107), and encompasses impeachment evidence as well as exculpatory evidence (*United States v. Bagley* (1985) 473 U.S. 667, 676).

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043 (*Salazar*), quoting *Strickler v. Greene* (1999) 527 U.S. 263, 281-282.) A defendant cannot show information is suppressed if it is in the "defendant's possession or is available to a defendant through the exercise of due diligence, . . . even if the prosecution is not the source of the evidence." (*Salazar*, at p. 1049.) To show the prejudice required for a *Brady* violation, the defendant "'must show a 'reasonable probability of a different result.'" (*Salazar*, at p. 1043.) We review de novo whether a defendant established the elements of a *Brady* claim. (*Salazar*, at p. 1042.)

We reject Defroe's *Brady* claim because he fails to show the evidence was suppressed and that prejudice resulted from the evidence not being produced. At trial, Defroe's former girlfriend testified that it was Fisher who was on the telephone getting

directions as she, Defroe and Fisher drove to the McDonald's parking lot where he was arrested. The testimony thus showed Defroe, who was in the car at the time, would have known that it was Fisher who spoke on his cell phone with the confidential informant. We must reject his argument that this information was suppressed, because it was in Defroe's possession and available through the exercise of due diligence. (*Salazar, supra*, 35 Cal.4th at pp. 1048-1049.)

In fact, Defroe was able to obtain and present evidence that it was Fisher who talked with the confidential informant. Yet the jury found Defroe guilty. Because the evidence was presented to the jury, we conclude it is not reasonably probable that the outcome would have been different had the information in Fisher's cell phone been turned over to Defroe. (*Salazar, supra*, 35 Cal.4th at pp. 1049-1050.) The cell phone information would not refute any of the elements or evidence upon which Defroe was convicted, and would simply duplicate evidence already in the record, which did not prevent the jury from finding that Defroe possessed and transported cocaine base. We therefore conclude that Defroe has failed to show any prejudice resulted, even if the information had been suppressed, and thus failed to demonstrate that his due process rights were violated by the prosecution's failure to supply the information in the cell phones. (*Ibid.*)

DISPOSITION

The convictions for possession and transportation of cocaine are reversed and the case is remanded to the trial court.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.